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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1104

REX CARDEN,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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IN THE

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OCTOBER TERM, 1965

No. .....

REX CARDEN,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

Petitioner Rex Carden prays that a writ of certiorari issue to review the final judgment of the Supreme Court of Tennessee entered in this cause on January 18, 1966.

CITATIONS TO OPINIONS BELOW

Opinions of Supreme Court of Tennessee are unreported and not marked for publication. Original opinion of the Supreme Court of Tennessee appears at page 109 of certified record, and copy is annexed at page A1. (Certified record will appear hereafter as "R.....").

Judgment pursuant to original opinion is at R. 110, and a copy is annexed at page A3.

Opinion of the Supreme Court of Tennessee on petition to rehear appears at R. 123, and is annexed at page A4.

Order denying petition to rehear was filed by Supreme Court of Tennessee, January 18, 1966, R. 125, and is annexed at A6.

JURISDICTION

Final judgment of the Supreme Court of Tennessee was entered January 18, 1966 (R. 125). Jurisdiction here is invoked under 28 U.S.C. 1257 (3).

HOW FEDERAL QUESTION IS PRESENTED

Petitioner was indicted September term 1963 of Criminal Court for Washington County, Tennessee, in a one-count indictment charging unlawful and felonious possession of alcoholic beverages in a quantity exceeding three gallons (27 pints), contrary to Tennessee Code Annotated 57-137 ("H", which precedes numbered pages of Record). No other provision of Code of Tennessee is mentioned in the indictment. (Tennessee Code Annotated hereafter is "T.C.A.").

The jury found petitioner guilty as charged (R. 75), and fixed petitioner's punishment at three years in the penitentiary. The court entered judgment sentencing petitioner for a period of two to three years (R. 81). Timely motion for new trial was filed (R. 83), in which petitioner specifically raised the question that he had been denied his right to a fair and impartial trial, and that he had

been denied due process of law under the Constitution of the United States. Motion for new trial was overruled (R. 86), which resulted in appeal to the Supreme Court of Tennessee, and decisions thereon by the Supreme Court of Tennessee heretofore set forth.

The intoxicating liquor was legal so far as the federal government is concerned, in that it was bottled and stamped under government supervision. The charge in the indictment was that the whiskey did not bear Tennessee revenue stamps required under T.C.A. 57-106. The charge in the indictment is a violation of T.C.A. 57-137. This section makes it unlawful for any person to possess "unstamped alcoholic beverages" in quantities in excess of three gallons in either a wet or dry county of Tennessee. The penal clause of this Code section provides:

> ". . . Violation shall be a felony punishable by imprisonment in the penitentiary for a term of not less than two (2) years."

No maximum sentence is provided.

In charging the jury with respect to the punishment it could fix in the event of conviction, the court read verbatim T.C.A. 57-137 (R. 168), and after charging that section, stated to the jury as follows:

> "In connection with the punishment upon a conviction for the above offense, our Supreme Court has said that the Section of the Code is not invalid because no maximum punishment is provided, but that our law supplies the maximum punishment of ten years in the penitentiary." (R. 69).

The court then stated to the jury that if it found petitioner guilty of possessing the unstamped intoxicating liquor, "you will fix his punishment at imprisonment in the penitentiary at a definite term of not less than two

years, and not more than ten years, the Jury to fix the maximum term." (R. 70).

The Supreme Court of Tennessee in its decision (R. 108-109), states:

> "T.C.A. Sec. 57-137 fixes the punishment for violation of this section at not less than two years but does not provide a maximum number of years. The Trial Judge charged the jury the maximum punishment would be ten years. This was under authority of T.C.A. Sec. 39-104",

and held that since the jury found petitioner guilty and fixed the maximum sentence at three years, the trial court correctly sentenced petitioner to serve not less than two nor more than three years in the State penitentiary, and that the trial court was correct in its sentence.

T.C.A. 39-104 is not mentioned in the indictment. T.C.A. 39-104 provides as follows:

> "*39-104. Penalty for felony.*—Whenever a person is convicted, either as principal or accessory, of a felony the punishment for which is not otherwise provided in this Code, he shall be sentenced to imprisonment in the penitentiary not less than one (1) nor more than ten (10) years."

Obviously petitioner could not be constitutionally sentenced under T.C.A. 39-104 because that section of the Tennessee Code imposes a sentence of not less than one year nor more than ten years, upon a person who is convicted of a felony, *where no punishment is otherwise provided.* T.C.A. 57-137 provides for punishment, but only for a minimum and not a maximum. What has been attempted here is to give petitioner a minimum sentence under T.C.A. 57-137 of two years, and a maximum sentence under T.C.A. 39-104 of ten years, disregarding the minimum sentence provided for in T.C.A. 39-104.

Petitioner was not properly informed of the nature of the charges against him, and T.C.A. 57-137 is indefinite, vague, and uncertain in its terminology, and particularly so when the sentence was imposed partially under the provisions of that section and partially under the provisions of T.C.A. 39-104.

QUESTION PRESENTED

Question No. 1. Was petitioner denied due process of law and equal protection of the law guaranteed him under the Fourteenth Amendment by reason of his being indicted under a vague and indefinite statute of Tennessee, to-wit: Tennessee Code Annotated 57-137, and sentenced partially under the provisions of that statute and partially under the provisions of Tennessee Code Annotated 39-104?

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent portions of the Sixth Amendment to the Constitution of the United States provide:

> "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation; . . ."

The pertinent portions of the Fourteenth Amendment to the Constitution of the United States provide:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or prop-

erty, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

TENNESSEE STATUTES INVOLVED

Tennessee Code Annotated:

"*57-137. Transportation or possession of unstamped alcoholic beverages in quantities of more than three gallons—Penalty.*— * * * It shall likewise be unlawful for any person, firm, or corporation, or association to possess unstamped alcoholic beverages as defined in said section in this state in quantities in excess of three (3) gallons in either wet or dry counties. Violation shall be a felony punishable by imprisonment in the penitentiary for a term of not less than two (2) years."

"*39-104. Penalty for felony.*—Whenever a person is convicted, either as principal or accessory, of a felony the punishment for which is not otherwise provided in this Code, he shall be sentenced to imprisonment in the penitentiary not less than one (1) nor more than ten (10) years."

REASONS FOR GRANTING THE WRIT

An important constitutional question is presented, not only for this petitioner, but for all others who may be sentenced under vague, indefinite and uncertain State statutes.

These actions of the State of Tennessee violated petitioner's rights under the Sixth Amendment, ". . . to be informed of the nature and cause of the accusation", and, therefore, his rights under the Fourteenth Amendment were violated. *Pointer* v. *Texas*, 380 U.S. 400, 85 S.Ct.

1065; *Escobedo* v. *Illinois*, 378 U.S. 478, 84 S.Ct. 1758; *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S.Ct. 792.

Without reliance upon the "absorption" or "incorporation" doctrine announced in *Pointer, Escobedo* and *Gideon*, the action of the State of Tennessee in petitioner's case violated his rights under the Fourteenth Amendment, in that such State action denied petitioner equal protection of the laws and due process of the law. *Carrington* v. *Rash*, 380 U.S. 91, 85 S.Ct. 89.

A person is entitled to reasonable notice of the charge against him and an opportunity to be heard, and to a fair and impartial trial. *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499. The statute under which petitioner was indicted gives no notice that petitioner would face possible imprisonment of ten years for possessing 27 pints of government bonded whiskey.

Action of the State here complained of is unconstitutional for the further reason that T.C.A. 57-137 is too vague, indefinite and uncertain to meet requirements of due process, and this is particularly true where T.C.A. 57-137 and T.C.A. 39-104, which provide for two different minimum sentences and one maximum sentence, are combined and commingled to provide the 2 to 3 years sentence.

An indefinite, vague, uncertain and inconsistent State statute violates the Fourteenth Amendment. *Bouie* v. *City of Columbia, S.C.*, 378 U.S. 347, 84 S.Ct. 1697; *Baggett* v. *Bullitt*, 377 U.S. 360, 84 S.Ct. 1316; *Wright* v. *State of Georgia*, 370 U.S. 935, 83 S.Ct. 1240; *Cramp* v. *Board of Public Instruction of Orange County, Fla.*, 368 U.S. 278, 82 S.Ct. 275; *U. S.* v. *Harriss*, 347 U.S. 612, 74 S.Ct. 808; *Adler* v. *Board of Education of City of New York*, 342 U.S. 485, 72 S.Ct. 380; *Winters* v. *People of State of New*

York, 333 U.S. 507, 68 S.Ct. 665; *Lanzetta* v. *State of New Jersey*, 306 U.S. 451, 59 S.Ct. 618. See also: *U. S.* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298; *American Seeding Mach. Co.* v. *Kentucky*, 236 U.S. 660, 35 S.Ct. 456; *Collins* v. *Kentucky*, 234 U.S. 634, 34 S.Ct. 924; and *International Harvester Co.* v. *Kentucky*, 234 U.S. 216, 34 S.Ct. 853.

CONCLUSION

For the foregoing reasons, and under the decisions of this Court, the petition for writ of certiorari applied for herein should be granted.

Respectfully submitted,

WILLIAM EARL BADGETT
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Counsel for Petitioner

REX CARDEN
vs.
STATE OF TENNESSEE
} No. 58
WASHINGTON CRIMINAL

(Filed December 11, 1964, W. H. Eagle, Clerk.)

IN THE SUPREME COURT OF TENNESSEE

APPEAL IN ERROR FROM THE CRIMINAL COURT OF WASHINGTON COUNTY
HONORABLE ORIS D. HYDER, JUDGE

OPINION FILED

For Rex Carden—Honorable Jack E. Vaughan of Johnson City, Tennessee.

For State of Tennessee—Assistant Attorney General, Thomas E. Fox.

JUDGMENT AFFIRMED

JUSTICE ROSS W. DYER

Opinion

The defendant, Rex Carden, appeals from a conviction of possession of more than three gallons of unstamped alcoholic beverages in violation of T.C.A. Sec. 57-137.

Police officers, armed with a search warrant, went to the home of defendant in Johnson City and found twenty-seven pints of unstamped whiskey.

The validity of the search warrant in this case is questioned on the ground the City Judge of Johnson City, Tennessee, was without jurisdiction to issue a search which act requires the exercise of judicial discretion. The legislature of Tennessee by Chapter 189, Private Acts of 1939 created a City Court for Johnson City and clothed the court with all the authority of a justice of the peace for violation of State laws within the boundaries of the municipality. By the terms of this Act the judge to preside over this court was to be appointed by the City Commissioners. The judge of this court would have authority to issue a search warrant for violation of a State law within the boundaries of the City. See Moore vs. State, 159 Tenn. 468; City of Elizabethton vs. Carter County, 204 Tenn. 452. This assignment of error is overruled.

T.C.A. Sec. 57-137 fixes the punishment for violation of this section at not less than two years but does not provide a maximum number of years. The Trial Judge charged the jury the maximum punishment would be ten years. This was under authority of T.C.A. Sec. 39-104. The jury returned a verdict of guilty fixing the maximum sentence at three years. The Court sentenced the defendant to serve not less than two or more than three years in the State Penitentiary. This is correct. Everhart vs. State, 194 Tenn. 272. The assignment of error directed to this matter is overruled.

We have examined the other assignments of error and find them without merit. The judgment is affirmed.

/s/ Ross W. Dyer
Ross W. Dyer, J.

SUPREME COURT OF TENNESSEE, AT KNOXVILLE

SEPTEMBER TERM, 1964

(Filed January 22, 1965, W. H. Eagle, Clerk)

FRIDAY, DECEMBER 11TH

BE IT REMEMBERED, That at a September Term of the Supreme Court for the Eastern Division of Tennessee, held at Knoxville on the Second Monday of September, 1964, the following proceedings were had and entered of record, to-wit:

Rex Carden
vs.
THE STATE } No. 58 WASHINGTON

Offense Possessing more than three gallons of unstamped Whiskey. Affirmed.

Came the plaintiff in error Rex Carden in proper person and by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Circuit Court of Washington County; and upon consideration thereof the Court is of opinion that there is no reversible error on the record and that the judgment of the Court below should be affirmed, and it is accordingly so ordered and adjudged by the Court.

It is therefore ordered by the Court that the plaintiff in error, for his offense of Possessing more than three gallons of Unstamped Whiskey be delivered to the Warden of the penitentiary, or his agent, and be by him conveyed to the penitentiary of the State of Tennessee and there continued at labor for a term of not more than Three (3) years, and not less than Two (2) years, commencing on the day taken into custody by the Sheriff of Washington County being Dec. 9, 1964.

It is further ordered by the Court that plaintiff in error be disqualified from holding any office under this State. The plaintiff in error will pay the costs of the cause accrued in this Court, and in the Court below, and execution may issue from this Court for the costs of the appeal. A procedendo will issue to the said Circuit Court of Washington County, directing that Court to proceed with the collection of the cost of the cause accrued therein in the manner provided by law.

The clerk of this Court will issue a duly certified copy of this judgment to the Sheriff of Washington County, which will be his authority for delivering the plaintiff in error to the Warden or his agent; and also a duly certified copy hereof to the Warden of the penitentiary, who will at once proceed to execute this judgment.

/s/ Weldon B. White
/s/ Ross W. Dyer
/s/ Andrew O. Holmes

REX CARDEN
Plaintiff in Error
vs.
STATE OF TENNESSEE
Defendant in Error
} WASHINGTON CRIMINAL

(Filed December 9, 1965, W. H. Eagle, Clerk)

Petition to Rehear

The defendant, Rex Carden, has filed a petition to rehear as a result of our original opinion filed 11 December 1964. The delay in acting upon this petition has been due to same being misplaced some where in the administrative process.

It is insisted that statements made by the affiant for the procurement of a search warrant should not have been believed by the trial judge. Excerpts from cross-examination of the affiant when he testified as a witness are cited in the petition as evidence of this fact.

The answer to this contention is that cross-examination for that purpose should not have been permitted in the trial of the case on the grounds that it was immaterial and an effort to collaterally attack the judgment of the judicial officer who issued the search warrant. This Court said in *O'Brien* v. *State,* 205 Tenn. 405, 418:

> In determining whether or not probable cause exists for the issuance of search warrants, the issuing magistrate performs a judicial act which is not subject to review by the court unless probable cause is not shown on the face of the warrant. The falsity of averments made in an affidavit, made prior to the issuance of the warrant, cannot be impeached by oral testimony at the trial. Solomon v. State, supra, Goss v. State of Maryland, 198 Md., 350, 84 A.2d 57, and Troxell v. State, 179 Tenn. 384, 166 S.W.2d 777.

Petition to rehear is denied.

/s/ Ross W. Dyer
Ross W. Dyer, J.

IN THE SUPREME COURT OF TENNESSEE AT KNOXVILLE

SEPTEMBER TERM, 1965

(Filed January 18, 1966, W. H. Eagle, Clerk.)

Rex Carden
vs.
State of Tennessee
} WASHINGTON COUNTY CRIMINAL

Petition to Rehear Denied

This cause came on to be further heard on the Petition to Rehear and Reply thereto, upon consideration whereof the Court is of the opinion the petition to rehear is not well taken and should be denied.

It is therefore ordered and decreed by the Court that the petition to rehear is denied.

Costs on the petition to rehear will be paid by Rex Carden, for which let execution issue.

/s/ Hamilton S. Burnett, C.J.
/s/ Ross W. Dyer
/s/ Chester C. Chattis